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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/676,016	09/29/2000	Seth Bradley Noble	004098.P003	3225
7590	10/24/2006		EXAMINER	
Robert B O'Rourke Blakely Sokoloff Taylor & Zafman LLP Seventh Floor 12400 Wilshire Boulevard Los Angeles, CA 90025-1026			COULTER, KENNETH R	
		ART UNIT	PAPER NUMBER	
		2141		
DATE MAILED: 10/24/2006				

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	09/676,016	NOBLE, SETH BRADLEY
	Examiner Kenneth R. Coulter	Art Unit 2141

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 19 July 2006.
- 2a) This action is FINAL.                            2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1-103 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) 1-15 is/are allowed.
- 6) Claim(s) 16-26,30-48 and 52-103 is/are rejected.
- 7) Claim(s) 27-29 and 49-51 is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on 29 September 2000 is/are: a) accepted or b) objected to by the Examiner. Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a). Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
  - a) All    b) Some \* c) None of:
    1. Certified copies of the priority documents have been received.
    2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
    3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413)
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	Paper No(s)/Mail Date. _____.
3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)	5) <input type="checkbox"/> Notice of Informal Patent Application
Paper No(s)/Mail Date _____.	6) <input type="checkbox"/> Other: _____.

## DETAILED ACTION

### ***Claim Rejections - 35 USC § 101***

1. 35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

2. Claims 60 – 103 are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter (“a machine readable medium includes read only memory (ROM); random access memory (RAM); magnetic disk storage media; optical storage media; flash memory devices; **electrical, optical, acoustical or other form of propagated signals (e.g., carrier waves, infrared signals, digital signals, etc.)**; etc.” p. 58 of the specification).
3. Claims 60 – 103 are directed to software (instructions) that are not implemented on a computer-readable **storage** medium.

Data structures not claimed as embodied in computer-readable media are descriptive material *per se* and are not statutory because they are not capable of causing functional change in the computer. See, e.g., *Warmerdam*, 33 F.3d at 1361, 31 USPQ2d at 1760 (claim to a data structure *per se* held nonstatutory). Such claimed data structures do not define any structural and functional interrelationships between the data structure and other claimed aspects of the invention which permit the data structure’s functionality to be realized. In contrast, a claimed computer-readable medium encoded with a data structure defines structural and functional interrelationships between the data structure and the computer software and hardware components which permit the data structure’s functionality to be realized, and is thus statutory.

***Claim Rejections - 35 USC § 102***

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

5. Claims 16 – 26, 30 – 48, 52 – 70, 74 – 92, and 96 – 103 are rejected under 35 U.S.C. 102(e) as being anticipated by Kalra et al. (U.S. Pat. No. 5,953,506) (Method and Apparatus that Provides a Scalable Media Delivery System).

5.1 Regarding claim 16, Kalra discloses a method comprising:  
updating statistics that characterize an existing transaction over a network between a client and a server so that said statistics reflect an arrival event, said transaction comprising a series of messages sent to said client from said server that each contain their own portion of data that is desired by said client, wherein, said arrival event is the arrival of one of said messages at said client, said statistics being maintained by said client (Abstract; Figs. 2A, 2B; Fig. 24, item 806; col. 23, lines 58 – 67; col. 24, lines 50 – 61); and

inquiring at said client whether increasing the information flow of said transaction is appropriate in light of said arrival event (Abstract; Fig. 2A; Fig. 24, item 806; col. 23, lines 58 – 67; col. 24, lines 50 – 61).

5.2 Per claims 38, 60, and 82, the rejection of claim 16 under 35 USC 102(e) (paragraph 5.1 above) applies fully.

5.3 Per claims 17 – 26 and 30 – 37, Kalra discloses the specifics involving the performance statistics being a window transit time (Abstract; Fig. 24; col. 24, lines 50 – 66; col. 25, lines 7 – 30 “statistics set”), average delay (Abstract; Fig. 24; col. 24, lines 50 – 66; col. 25, lines 7 – 30), arrival rate of expected messages (Abstract; Fig. 24; col. 24, lines 50 – 66; col. 25, lines 7 – 30), and state of a queue (Abstract; Fig. 24; col. 24, lines 50 – 66; col. 25, lines 7 – 30).

5.4 Regarding claims 39 – 48, 52 – 59, 61 – 70, 74 – 81, 83 – 92, and 96 – 103, the rejection of claims 17 – 26 and 30 – 37 under 35 USC 102(e) (paragraph 5.3 above) applies fully.

6. Claims 16, 38, 60, and 82 are rejected under 35 U.S.C. 102(e) as being anticipated by Allard et al. (U.S. Pat. No. 6,018,619) (Method, System and Apparatus for Client-Side Usage Tracking of Information Server Systems).

6.1 Regarding claim 16, Allard discloses a method comprising:  
    updating statistics that characterize an existing transaction over a network  
between a client and a server so that said statistics reflect an arrival event, said  
transaction comprising a series of messages sent to said client from said server that  
each contain their own portion of data that is desired by said client, wherein, said arrival  
event is the arrival of one of said messages at said client, said statistics being  
maintained by said client (Fig. 2, items 38, 48 "Tracking Client Session Usage Log"; col.  
4, lines 47 – 50 "client-side usage tracking system"; col. 10, lines 10 – 19 "save a  
session usage log on a disk 38 (or RAM) local to the tracking client computer."); and  
    inquiring at said client whether increasing the information flow of said transaction  
is appropriate in light of said arrival event (Abstract; Fig. 2; col. 6, lines 54 – 64; col. 15,  
line 1 – 29).

6.2 Per claims 38, 60, and 82, the rejection of claim 16 under 35 USC 102(e)  
(paragraph 6.1 above) applies fully.

***Response to Arguments***

7. Applicant's arguments filed 7/19/06 have been fully considered but they are not  
persuasive.

Applicant argues that Kalra does not explicitly disclose “statistics reflecting an arrival of a message, sent from a server, at the client computer”.

Examiner disagrees.

Kalra specifically discloses “a statistics set 806 that contains **run time performance information on the client** including time used to render the previous frame, ... “ (col. 24, lines 52 – 54).

Applicant argues that Allard teaches the “usage log created on the user’s client computer records all objects retrieved from a particular Web site and other attributes of user processing such as time spent viewing an object, amount of an object viewed, etc., not statistics reflecting an arrival of a message among a series of messages sent from a server at the client computer, such as recited in claim 16.”

Examiner disagrees.

Examiner point out that Allard teaches “that a multitude of other statistics may be determined useful and can be implemented as part of this invention without parting from the spirit thereof.” (col. 7, line 67 – col. 8, line 3).

This passage includes statistics involving the arrival of a message.

***Allowable Subject Matter***

8. Claims 1 – 15 are allowed.

9. Claims 27 – 29 and 49 – 51 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

***Conclusion***

10. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Krishnan     U.S. Pat. No. 5,799,002    Adaptive Bandwidth Throttling for Network Services

An adaptive bandwidth throttling system that throttles services to the client based on the effective bandwidth utilized by the network server.

Sidi et al.     U.S. Pat. No. 6,725,249    Method for Economically Sub-Optimizing Interactions in Data Communications Network Environments, and a Device According to the Method

Method of throttling certain interactions between a user and provider.

11. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kenneth R. Coulter whose telephone number is 571 272-3879. The examiner can normally be reached on 549.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Rupal Dharia can be reached on 571 272-3880. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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